No. 85535

IN THE SUPREME COURT OF MISSOURI

GARY W. BLACK,

Appellant,

vs.

STATE OF MISSOURI

Respondent.

Appeal from the Circuit Court of Jasper County, Mo.
29th Judicial Circuit, Division III
The Honorable John Dermott, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

BRECK K. BURGESS
Assistant Attorney General
Missouri Bar No. 34567
Post Office Box 899
Jefferson City, Mo 65102-0899
(573) 751-3321
Attorneys for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

OTHER STATUTES

JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Rule 29.15 in the Circuit Court of Jasper County. The conviction sought to be vacated was for murder in the first degree, §565.020, RSMo 2000, for which the sentence was death. This Court has jurisdiction over this appeal because of its order effective July 1, 1988, that all death penalty post-conviction appeals be heard here, pursuant to this Court's power under Rule 83.01.

STATEMENT OF FACTS

The appellant, Gary W. Black, was charged by information with one count of murder in the first degree (L.F. 22). An amended information was filed that further alleged that appellant was a prior and persistent offender based on his prior convictions for burglary, armed robbery, and felonious assault (L.F. 460). On December 6, 1999, the cause went to trial before a jury in the Jasper County Circuit Court, the Honorable Jon Dermott presiding (Tr. 1-2). Appellant was represented by Valerie Leftwich and Kimberly Shaw (Tr. 1).

Viewed in the light most favorable to the verdict, the following evidence was adduced: On the evening of October 2, 1998, the victim, Jason Johnson, who was a student at Missouri Southern State College, finished working at his job in a store at the Northpark Mall in Joplin (Tr. 576-583; State's Exhibit 19). He met Andrew Martin at the Garfield's restaurant at the mall at about 6:30 or 7:00 p.m. (Tr. 581). After they each had a beer at that restaurant, Martin took the victim to the victim's home so that the victim could change his clothes, and Martin called Mark Wolfe to see whether he wanted to meet them at Garfield's (Tr. 582). The victim and Martin returned to Garfield's at about 8:00 p.m., and Wolfe arrived there shortly thereafter (Tr. 584, 693). They ate supper and drank some beer (Tr. 584-585, 674-675). The victim appeared to be "buzzed" from alcohol, but did not appear to be "falling all over himself" (Tr. 706, 714).[1]

They then made plans to go to Rafters, which was a nightclub at 6th and Joplin in

[1]Appellant presented evidence that the victim had a blood alcohol content of .29% after he was taken to the hospital (Tr. 635, 917).

downtown Joplin (Tr. 687). The victim and Martin got into Martin's 1996 Ford F-150 pickup truck, while Wolfe got into his 1987 Camaro (Tr. 585-586, 675-676). As they all drove towards Rafters, they stopped at a convenience store, the Snak Atak on 4th and St. Louis (Tr. 587, 677; State's Exhibits 1-2, 18).

The victim went into the store, while Martin and Wolfe remained in their vehicles (Tr. 587, 679). The victim purchased a bottle of beer, which was in a paper bag, and a can of chewing tobacco (Tr. 593-594-679). In the store, the victim stood close behind appellant's girlfriend, Tammy Lawson, in the checkout line (State's Exhibit 13A; Tr. 920). While the victim was in line, he leaned around and looked at her face (State's Exhibit 13A). When the victim exited the store, the appellant was sitting in the driver's seat of his white Buick LaSabre, which was parked on the east side of the store (Tr. 590-593, 678, 683, 792; State's Exhibit 20). Lawson, who was now with appellant, pointed in the direction of the victim and said something to appellant (Tr. 594, 681). Appellant and Lawson were both white, while the victim was an African-American (State's Exhibits 13A, 19, 23).

The victim got into Martin's truck and they began driving again, with Wolfe following behind them (Tr. 594, 682). However, appellant was also following them in his car (Tr. 682-687). When Martin stopped his truck in the left lane at a stoplight at the corner of 5th and Joplin, appellant pulled up in the right lane next to that truck (Tr. 686-687, 718; State's Exhibits 4, 18).

While they were sitting at the stoplight and Martin was talking out the driver's-side window to two female friends, who were walking to a nearby ATM machine, appellant

"exchange[d] words" with the victim (Tr. 600, 640, 687, 960-962, 1019-1020). Appellant then got out of his car, and went over to the passenger-side window of Martin's truck (Tr. 687). As the victim started opening the passenger-side door of the truck, appellant reached in through the window of that door, and stabbed the victim in left side of the neck (Tr. 607-608, 658, 687-689, 719-720, 770, 895-898, 938-941, 1021). When appellant stabbed the victim, the passenger-side door was about one quarter open, and the victim had turned to get out of the truck so that the left side of his neck was facing the passenger-side door (Tr. 689, 700, 713-714).

The single stab wound was 4.5 to 6 inches deep and 2.5 to 3 centimeters long (Tr. 891, 897-898). The victim's left carotid artery and left jugular vein were completely severed (Tr. 892, 894-896, 911). Blood poured from these wounds (Tr. 607, 658, 720, 770).

As appellant fled to his car, the victim got out of the truck and weakly threw his paper bag that contained a beer bottle at appellant (Tr. 610-611, 690, 721-722, 941). As appellant drove off, the victim staggered and slowly got back into the truck (Tr. 611-613, 691-692, 724-725). The truck pulled into a parking lot, an ambulance was called, and bystanders attempted to slow the victim's bleeding by applying direct pressure to the wound with clothing and towels (Tr. 614, 653, 726, 729).

An ambulance arrived on the scene about one minute after it was dispatched, and the paramedics found that the victim was unresponsive and had suffered from massive blood loss (Tr. 770, 775). As the victim was being taken to Freeman Hospital, he could not breathe because of the blood draining into his airway (Tr. 911, 774).

At the hospital, the victim's carotid artery was repaired (Tr. 885). However, the victim had already suffered brain damage from the lack of oxygen that resulted from the cutting of his carotid artery and the obstruction of his airway (Tr. 885-887, 909-912). His brain became swollen from brain damage that resulted from oxygen deprivation (Tr. 885, 910). He died on October 5, 1998 (Tr. 885, 910).

At about 2:30 a.m., the morning after the crime (October 3, 1998), Officer Bill Goodwin, of the Joplin Police Department, was informed that a female who was involved in the incident had given a statement (Tr. 786). After hearing about that statement, Officer Goodwin went to a grassy area east of St. Louis and Broadway in Joplin and found a knife (Tr. 784-786; State's Exhibit 10). The knife was consistent with the object that inflicted the stab wound in the victim's neck (Tr. 905).

Appellant was arrested in Oklahoma on a Missouri arrest warrant (Tr. 789-790). An inventory search was conducted on the appellant's white Buick LaSabre, and an empty sheath for a knife was found in its glove compartment (Tr. 791-792; State's Exhibit 11).

Appellant did not testify on his own behalf. He called eight witnesses in an attempt to present the issue of self-defense to the jury (Tr. 930-1032).

At the close of the evidence, instructions and argument of counsel, the jury found that the appellant was guilty as charged (Tr. 1111).

In the penalty phase, the State presented additional evidence concerning the murder. Tammy Lawson, who was dating and living with appellant at the time of the murder, testified that she was in the Snak Atak when the victim was there (Tr. 1151, 1153). She said that she

mistakenly thought that the victim was making a pass at her when he came in and pressed up against her (Tr. 1151). She got in a car with appellant and told him what had occurred (Tr. 1152-1153). Appellant asked her to point out the victim, and Lawson pointed him out to appellant as the victim left the convenience store (Tr. 1153, 1163). Appellant became irritated (Tr. 1153). As the pickup truck that contained the victim drove off, appellant followed behind it in his car (Tr. 1153-1154).

Lawson asked what appellant was going to do (Tr. 1155). Appellant said that he was "going to hurt that nigger" (Tr. 1155).

Appellant stopped his car next to the truck (Tr. 1155). He pulled out a knife that he normally concealed in a sheath at the small of his back, and he got out of his car (Tr. 115-1157). After he got back into the car and started driving off at a high rate of speed, he said, "One nigger down" (Tr. 1157). At the corner of Broadway and St. Louis, appellant took out the knife again and threw it out of the car (Tr. 1158).

After washing blood off of the driver's door of the car and packing clothes, appellant and Lawson fled to a trailer in Grove, Oklahoma (Tr. 1158-1159). While they were hiding there, appellant told Lawson that if they were caught she was supposed to say that the victim hit him first (Tr. 1160). Appellant told her that he was good at getting rid of witnesses (Tr. 1160). Appellant was arrested on October 5, 1998 (Tr. 1160-1161).

The State presented evidence of appellant's prior convictions for armed robbery and felonious assault (State's Exhibit 24; Tr. 1150). It presented evidence about appellant assaulting other inmates in 1982, 1986, 1992, 1993, and 1995, while he was incarcerated in

the Missouri Training Center for Men in Moberly, the Algoa Correctional Center, the Central Missouri Correctional Center, and the Jefferson City Correctional Center (State's Exhibit 24).

The evidence also showed that on September 4, 1999, while appellant was an inmate in the Jasper County Jail, appellant walked into an off-limits area, punched Deputy Robert Saltkill, of the Jasper County Sheriff's Department, in the left eye, and then tried to claw at his eye (Tr. 1180-1184; State's Exhibit 25). This attack, which caused Deputy Saltkill to have to go to a hospital and an eye center, damaged Deputy Saltkill's left eye and has left him with impaired vision (Tr. 1186-1187; State's Exhibit 25).

On October 6, 1999, appellant said to Deputy Saltkill:

> Fuck the Miranda Warning, you tell that mother fucker Dankelson [, the prosecutor,] that I never attempted to kill anybody. The people I've attempted to kill, I've killed. Remember that, remember that, Saltkill, and cops too.

(Tr. 1191-1192).

The victim's brother, Darren Johnson, testified about the victim (Tr. 1203-1208).

Appellant did not testify on his own behalf or present any evidence. At the close of the evidence, instructions and argument of counsel, the jury recommended the death penalty (L.F. 585). It found as statutory aggravating circumstances that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind, § 565.032.2 (7), RSMo 2000, and that appellant had a prior conviction for armed robbery and a prior conviction for felonious assault, which are serious assaultive convictions under § 565.032.2 (1), RSMo 2000 (L.F. 585). On January 4, 2000, the trial court sentenced the appellant to death (L.F. 612). On

appeal, this Court affirmed appellant's conviction and sentence. State v. Black, 50 S.W.3d 778 (Mo.banc 2001), cert. denied 534 U.S. 978 (2002).

On November 19, 2001, appellant filed a Rule 29.15 motion (P.C.L.F. 1). An amended Rule 29.15 motion was filed for appellant by counsel on March 14, 2002 (P.C.L.F. 94-203). An evidentiary hearing was held on June 24, 2003, before Judge McDermott (P.C.Tr. 1). The motion court filed its findings of fact and conclusions of law and denied appellant's Rule 29.15 motion on July 17, 2003 (P.C.L.F. 243-252).

ARGUMENT

I.

The Rule 29.15 motion court did not clearly err when it denied appellant's claim that he was denied effective assistance of counsel on the ground that his trial counsel did not call Gene Gietzen, a blood splatter expert, to testify that the victim could not have been inside the truck when he was stabbed because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced in that his counsel conducted a reasonable investigation of blood splatter evidence and Gietzen's testimony, when viewed in its entirety, was consistent with the State's theory.

Appellant claims that he was denied effective assistance of counsel in the guilt phase on the ground that his trial counsel failed to call Gene Gietzen, who is a blood splatter expert, to testify that the victim could not have been in the pickup when he was stabbed because there was allegedly no evidence of an arterial spurt occurring inside the truck (App.Br. 29). Appellant alleges that this would have contradicted the testimony of the eyewitnesses and shown that the victim was outside the truck when appellant stabbed him in the neck, and that this allegedly would have refuted the State's allegation that he deliberated in the murder (App.Br. 29). However, as will be discussed below, Gietzen would have testified that he did not know whether an arterial spurt occurred in the truck and he could not say whether the victim was stabbed while he was within the truck (Gietzen deposition at 45, 59, 64-65).

A. Standard of review

On appeal from the denial of a post-conviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. State v. Taylor, 929 S.W.2d 209, 224 (Mo.banc 1996), cert. denied 519 U.S. 1152 (1997).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or a death sentence has two components. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The defendant must show that counsel's performance was deficient and that it prejudiced the defense. Id., 466 U.S. at 687.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id. 466 U.S. at 688. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Wiggins v. Smith, ____ U.S. ____, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003). In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra 466 U.S. at 694.

B. Motion court's findings

In the case at bar, the motion court made the following findings:

> In claim 8(g) Movant raises the issue of trial counsel's failure to call a

"spatter" expert in connection with the blood pattern found inside the pickup truck. The claim is this would have shown Movant was not the aggressor. A spatter expert's deposition, Gene Gietzen, was offered and admitted into evidence at this hearing. Mr. Gietzen testified on deposition the blood pattern showed no splatter ("arterial spurt") while the victim was seated inside the truck facing either to the front or looking out of the right side door. This indicated to him the victim got out of the cab before he was stabbed and tended to support movant's claim he acted in self defense. He conceded the photographs did not show spatter on the road and that the blood found inside the cab could be consistent with the state's argument defendant was stabbed inside the cab, then got out, and then got back inside. He also testified the only area of splatter shown in the photographs was inside the cab along the right side of the seat. He emphasized the photographs of other areas were dark, inferring any splatter could not therefore be seen on the outside of the vehicle. The foregoing notwithstanding, and following discussion of trial counsel with their own medical expert, counsel determined a "spatter" expert would not be helpful. The court agrees because of the state's theory the victim may have gotten out of and back inside of the vehicle and because the only physical evidence of splatter was on the right side of the seat, inside the truck. Such a pattern was consistent with the State's version of the facts.

C. Analysis

The motion court's findings are supported by the evidence that was adduced at trial and in post-conviction proceedings.

1. Trial testimony

The evidence in the guilt phase of appellant's trial showed that appellant became angry at the victim, got into his car and followed the truck that the victim was a passenger in for over a mile until the truck stopped at the corner of 5th and Joplin, where appellant pulled up in the right lane beside that truck (Tr. 594, 681, 686-687, 718; State's Exhibits 4, 18).[2] While they were sitting at the stoplight and the driver of the truck, Andy Martin, was talking out the driver's-side window to two female friends, who were walking to a nearby ATM machine, appellant "exchange[d] words" with the victim (Tr. 600, 640, 687, 960-962, 1019-1020). Appellant then got out of his car and went over to the passenger-side window, which was rolled down, of Martin's truck (Tr. 608, 687). As the victim started opening the passenger-side door of the truck, appellant reached in through the window of that door, and stabbed the victim in the left side of the neck (Tr. 607-608, 658, 687-689, 719-720, 770, 895-898, 938-941, 1021). When appellant stabbed the victim, the passenger-side door was about one quarter open, and the victim had turned to get out of the truck so that the left side of his neck was facing away from the driver (Tr. 689, 700, 713-714).

---

[2] In the penalty phase, the evidence explained that appellant followed the victim in his car and said that he was "going to hurt that nigger" because he thought that the victim had made a pass at his girlfriend (Tr. 1151).

The single stab wound was 4.5 to 6 inches deep and 2.5 to 3 centimeters long (Tr. 891, 897-898). The victim's left carotid artery and left jugular vein were completely severed (Tr. 892, 894-896, 911). Blood poured from these wounds (Tr. 607, 658, 720, 770).

As appellant fled to his car, the victim got out of the truck and weakly threw his paper bag that contained a beer bottle at the appellant (Tr. 610-611, 690, 721-722, 941). As appellant drove off, the victim staggered and slowly got back into the truck (Tr. 611-613, 691-692, 724-725). The truck pulled into a parking lot, an ambulance was called, and bystanders attempted to slow the victim's bleeding by applying direct pressure to the wound with clothing and towels (Tr. 614, 653, 726, 729). About two pints of blood could be seen on the seat of the truck (Tr. 771).

2. Post-conviction evidence

At the Rule 29.15 evidentiary hearing, one of appellant's trial counsel, Valerie Leftwich, testified that she had been trained about blood splatter experts and had seen them testify in cases (P.C.Tr. 38). During her preparation for appellant's trial, she and her co-counsel, Kimberly Shaw, consulted with Dr. Charles Mauldin, who is an emergency services expert who testifies in a large number of cases (P.C.Tr. 72). They discussed the issue of how the victim was positioned based on the bloodstains that were found (P.C.Tr. 71). After discussing this issue with Dr. Mauldin, they decided that they would not be able to find a blood splatter expert who would be helpful (P.C.Tr. 71-72). Other evidence at the post-conviction hearing showed that they were right.

Gene Giezen, who is the owner of Forensic Consulting Associates, testified through

deposition in the post-conviction proceedings (Gietzen deposition at 5). Even though the eyewitnesses testified that appellant stabbed the victim as the victim was in the truck and the victim got back into the truck after being stabbed in the neck, Gene Gietzen initially said that there was no evidence of arterial spurts in the truck (Tr. 611-613, 658, 687-691, 725, 719-720, 770-771, 1021; Gietzen Deposition at 28, 38, 53).

He then had to backtrack. He admitted that on the lower right-hand side of the passenger-side seat by the seat adjustment there was blood that was "possibly [an] arterial spurt" and that had "some characteristics of arterial spurt," but that he could not say whether or not it was an arterial spurt without better photographs (Gietzen Deposition at 45, 64). He admitted that there was a blood splatter on the inside of the passenger door, but he could not offer an opinion as to how it got there due to the lack of closeup photographs (Gietzen Deposition Exhibit 7 at 4). He further admitted that there was also evidence of pooling of blood on the seat, the floor on the passenger side, and the doorframe of the passenger door (Gietzen Deposition at 29, 33, 37, 65). When asked whether it was possible that the victim was stabbed while he was still inside the truck, he said "I couldn't opine on that, mainly because that would depend on what possibility you're talking about" (Gietzen Deposition at 59).

He said that there was an arterial spurt on the side of the truck that was consistent with the victim getting into the truck after he had been stabbed (Gietzen Deposition at 65). He admitted that the driver of the truck did not give the victim immediate medical attention after the victim got back into the truck, and he could not explain why there was no evidence of an arterial spurt inside the truck from when the victim got back into the truck (Gietzen Deposition

at 68).

3. Discussion

From the above, it can be seen that appellant's trial counsel acted reasonably when they investigated the question of blood splatter evidence and decided against pursuing it. Leftwich was trained in using that evidence, was familiar with its use, and discussed the blood evidence with her co-counsel and a medical doctor before deciding not to investigate this matter further (P.C.Tr. 38, 71-72).

Additionally, appellant failed to prove that he was prejudiced by the actions of his counsel because the blood spatter evidence was consistent with the State's evidence. State v. Ferguson, 20 S.W.3d 485, 507 (Mo.banc 2000) cert. denied 531 U.S. 1019 (2000). Taken as a whole, Gietzen's testimony was that he could not say that the victim was not stabbed while the victim was in the truck, there may have been arterial spurting inside the truck, and he could not explain why there would be no evidence of arterial spurting in the truck in light of the undisputed evidence that the victim got back into the truck after being stabbed in the neck without having anyone immediately assist him (Geitzen deposition at 4, 45, 59, 64, 68; Tr. 611-613, 691-692, 724-725).

Moreover, according to Geitzen his theory of no arterial spurting in the truck could be defeated if something had blocked the spurting of blood from the victim's neck by compressing the wound (Geitzen deposition at 66). This analysis is consistent with the victim immediately using his hand to compress the wound when he was stabbed and after he got back into the truck, and it explains why there was the pooling of blood from the dripping of blood

in the door frame area where the victim was stabbed and on the seat where he sat after he got back into the truck before receiving medical attention (Geitzen deposition at 66, 68; State's Exhibits 10-14). It is also consistent with Geitzen's testimony about observing a blood splatter on the inside of the passenger door that he cold not tell how it got there due to the quality of the pictures (Tr. Geitzen deposition at 4).

In light of the above, the motion court did not clearly err when it denied appellant's claim because the record showed that appellant's counsel conducted a reasonable investigation of the question of presenting blood splatter evidence and reasonably chose not to pursue that evidence. Further, appellant was not prejudiced by his counsel not calling Gietzen as a witness because there is no reasonable probability that a different result would have occurred if he had been called in light of the fact that his testimony was consistent with the State's case and would not have provided appellant with a viable defense. Thus, appellant's first point on appeal must fail.

II.

The Rule 29.15 motion court did not clearly err when it denied appellant's claim that he was denied effective assistance of counsel in the guilt phase on the ground that his trial counsel failed to impeach State's witnesses Andy Martin, Jamie Brandon, Mark Wolfe, and defense witness Michelle Copeland with their prior statements because appellant failed to prove that admissible inconsistent statements of these witnesses existed that could have been used to impeach these witnesses and that would have caused a reasonable probability of a different result in this case.

Appellant alleges that the motion court clearly erred when it denied his claim that his trial counsel were ineffective because they failed to impeach State's witnesses Andy Martin, Jamie Brandon, Mark Wolfe, and defense witness Michelle Copeland with their prior statements (App.Br. 43).

At the post-conviction evidentiary hearing, Valerie Leftwich testified that she pointed out the inconsistencies that she thought were relevant in the testimony of the witnesses (P.Tr. 78). The motion court found that there was no trial strategy involved in counsel not attempting to impeach the witnesses on the matters in question, but that appellant was not prejudiced by the actions of his counsel in that adequate impeachment occurred and additional impeachment would not have created a reasonable probability of a different result. (P.C.L.F. 246-247).

A. Alleged impeachment as to stabbing through the open truck window

Appellant argues that his trial counsel should have tried to impeach the witnesses who saw the stabbing and said that it occurred while the victim was inside the truck (App.Br. 44).

1. Andy Martin

Appellant says that his counsel attempted to impeach Martin, so Martin is irrelevant to this claim (App.Br. 45). However, since appellant discusses this testimony respondent will note that Andy Martin testified on direct examination that the victim was bleeding as the victim stepped from the truck (Tr. 607). Appellant's counsel attempted to impeach him by asking him about whether he told an officer that he saw that the victim was bleeding when he returned to the truck (Tr. 644-646). However, Martin said that he saw that the victim was bleeding when he got out of the truck *and* when he returned to the truck (Tr. 644). He was not inconsistent.

2. Mark Wolfe

Appellant alleges that his counsel should have impeached Wolfe's testimony about seeing appellant stab the victim through the window with the deposition of another person (App.Br. 45; Tr. 687, 689, 699-799; P.C.Tr. 23). He alleges that Wolfe should have been impeached with the deposition of Officer Joseph Beil that indicated that Beil said that Wolfe told him that the victim and appellant both got out of their cars and exchanged words (P.C.Tr. 23). Officer Beil did not testify in post-conviction proceedings so the only evidence on this matter is Leftwich's testimony about what was in the deposition (P.C.Tr. 23).

The motion court did not clearly err in finding that the evidence in question would not have caused a reasonable probability of a different result in the case. Strickland v. Washington,

466 U.S. 668, 694, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). It would not be inconsistent with Wolfe's testimony for the victim to get out of the truck after he was stabbed and to exchange words with appellant as he fought off appellant (Tr. 689-692, 706).

Moreover, appellant failed to prove that he had any admissible evidence that would have impeached Wolfe on this subject. He did not prove that Wolfe would have admitted to making the alleged prior statement, if asked, and Officer Beil did not testify in post-conviction proceedings about Wolfe making the statement. Wolfe could not have been impeached with the deposition of Beil concerning what Wolfe allegedly said because this would be hearsay in that it would be using Officer Beil's out-of-court statements about what Wolfe said for the truth of the matters asserted therein. State v. Hutchison, 957 S.W.2d 757, 760-761 (Mo.banc 1997); State v. George, 921 S.W.2d 638, 648 (Mo.App., S.D. 1996).

3. James Brandon

Brandon testified that appellant reached in through the window of the truck, causing the victim's head to jerk backwards, and that the victim then got out of the truck and fought with appellant by swinging a beer bottle at him and by grabbing him (Tr. 717-724).

Appellant alleges that Brandon should have been impeached with Officer Beil's deposition which indicated that Officer Beil said that Brandon said that appellant and the victim exchanged blows in the middle of the road (App.Br. 45; P.C.Tr. 27). However, this is not inconsistent with appellant stabbing the victim through the window and then the blows being exchanged in the street as the victim fought off appellant.

Moreover, appellant failed to prove that he had any admissible evidence that would have

impeached Brandon on this subject. He did not prove that Brandon would have admitted to making the alleged prior statement, if asked, and Officer Beil did not testify in post-conviction proceedings about Brandon making the statement. Brandon could not have been impeached with the deposition of Beil concerning what Brandon allegedly said because this would be hearsay in that it would be using Officer Beil's out-of-court statements about what Brandon said for the truth of the matters asserted therein. State v. Hutchison, supra at 760-761; State v. George, supra at 648.

4. Michelle Copeland

Appellant also alleges that his counsel should have impeached defense witness Copeland about whether she saw appellant stab the victim in the truck (App.Br. 46). At trial she testified that she did not see the victim ever get out of the truck, and she did not see appellant stab him (Tr. 962-963). Appellant alleges that she should have been impeached with a statement that was contained in a report that was made by a private investigator, Brian Wilburn, which indicated that Copeland said that the victim yelled at someone on the night of the incident, the victim got out of the truck, and she did not see any injury to the victim (App.Br. 46; P.C.Tr. 36). However, counsel cannot be ineffective for not impeaching his own witness and undermining her credibility, and evidence that she did not see an injury to the victim was not inconsistent with evidence that she did not see the victim get stabbed.

Additionally, appellant failed to prove that he had any admissible evidence that would have impeached Copeland on this subject. He did not prove that Copeland would have admitted to making the alleged prior statement, if asked, and Wilburn did not testify in post-conviction

proceedings about Copeland making the statement. Copeland could not have been impeached with the report of Wilburn concerning what Copeland allegedly said because this would be hearsay in that it would be using Wilburn's out-of-court statements about what Copeland said for the truth of the matters asserted therein. State v. Hutchison, supra at 760-761; State v. George, supra at 648.

B. Alleged impeachment of Wolfe about appellant getting hit with a beer bottle

In appellant's trial, Wolfe testified that the victim got out of the truck, swung a brown bag at appellant, and that he heard a breaking sound as the bag struck the ground (Tr. 690). Appellant alleges that his trial counsel should have impeached Wolfe with a police report of Officer Darren Gallup that indicated that Wolfe told Officer Gallup that the victim hit appellant with a brown bag containing a beer bottle (App.Br. 46; P.Tr. 24). However, appellant's trial counsel did not attempt this impeachment because she knew that these statements were not inconsistent (P.Tr. 25). The victim could have thrown a bag at appellant, the bag could have hit appellant, and then the bottle in the bag could have broken as the bag hit the ground.

Additionally, appellant failed to prove that he had any admissible evidence that would have impeached Wolfe on this subject. He did not prove that Wolfe would have admitted to making the alleged prior statement, if asked, and Officer Gallup did not testify in post-conviction proceedings about Wolfe making the statement. Wolfe could not have been impeached with the report of Gallup concerning what Wolfe allegedly said because this would be hearsay in that it would be using Gallup's out-of-court statements about what Wolfe said for the truth of the matters asserted therein. State v. Hutchison, supra at 760-761; State v.

George, supra at 648.

C. Alleged impeachment about drinking

1. Andrew Martin

In appellant's trial, Martin testified that he met the victim at a Garfield's restaurant at about 6:30 or 7:00 p.m., and that the victim arrived there first (Tr. 581). After they each had a beer at that restaurant, Martin took the victim to the victim's home so the victim could change his clothes, and Martin called Wolfe to see whether he wanted to meet them at Garfield's (Tr. 582). The victim and Martin returned to Garfield's at about 8:00 p.m., and Wolfe arrived there shortly thereafter (Tr. 584, 693). They ate supper and drank some beer (Tr. 584-585, 674-675). Martin said that the victim appeared to be "buzzed" from alcohol, but did not appear to be falling all over himself (Tr. 706).

On cross-examination, appellant's counsel impeached Martin by presenting evidence that Martin did not know how many beers the victim had at Garfield's before Martin arrived there the first time, and by presenting evidence that the victim had a blood alcohol content of .29% after he was taken to the hospital (Tr. 630, 635, 917).

Appellant contends that his counsel was ineffective for not attempting to impeach Martin with his deposition in which he said that he and the victim went to Garfield's right after the victim got off of work, each had one beer, and then went back there later for another 30-to 40 minutes and drank some beer (Supp.L.F. 34-35, 47). However, appellant could not have been prejudiced by the actions of his counsel because the more favorable version of the facts for appellant was the version told at trial in which the victim arrived at Garfield's before Martin

and Martin could not say how much appellant drank before he got there (Tr. 630). Additionally, appellant's counsel effectively impeached Martin on the issue of the victim's alcohol consumption by eliciting evidence of appellant's blood alcohol content of .29% (Tr. 630, 635, 917).

2. Mark Wolfe

During appellant's trial, Wolfe testified that he met the victim and Martin in Garfield's, they stayed for about 30 minutes and each drank a beer while he was there, and that they then left (Tr. 674-674). He said that the victim was not intoxicated (Tr. 675). Appellant presented testimony from Officer Darren Gallup that Wolfe told him that Johnson had four or five beers at Garfield's (Tr. 818).

Appellant contents that Wolfe should have been impeached with his deposition in which he said that he got off work at 3:30 p.m., stayed home until around 9:00 p.m., and then went to Garfield's at about 9:00 p.m., where he met the victim and Martin (Supp.L.F. 65-73). He said that they all had a beer, and then left in a hurry at about 9:30 p.m. because they were in a hurry to go to Rafters (Supp.L.F. 73-79). However, this deposition testimony would not have impeached Wolfe because it was consistent with Wolfe's trial testimony, and Wolfe was impeached by counsel by the testimony described in the section immediately above concerning the victim being intoxicated (Tr. 630, 635, 917).

D. Andy Martin's identification of appellant

Appellant alleges on appeal that his trial counsel failed to impeach Martin with a

statement that indicated that he did not see appellant at the Snak Atak (App.Br. 48).

In appellant's trial, Martin said that a male, who he could not identify *at that time*, parked a car on the east side of the Snak Atak and that he saw a woman near that car (Tr. 590-591). When asked if he could describe the man, he said that he had darkish-colored sandy hair that was kind of long for a middle-aged man (Tr. 592). He did not disclose whether this knowledge was based on his observations at the Snak Atak, what was told to him at the Snak Atak, or if it was based on his observations of appellant after appellant got out of that car at the crime scene. He identified appellant as that man (Tr. 593).

In a recorded statement to the police, Martin had said that he was not sure if the suspect went into the store, but that he thought the suspect was with a female who was wearing a purple shirt (Movant's Exhibit 17 at 10). He said that the suspect parked on the east side of the building, but he never saw him get out of the car and did not see him in the store (Movant's Exhibit 17 at 11-12). He said that he remembered the female walking in front of his truck at the store, but he did not remember seeing the suspect walking with her (Movant's Exhibit 17 at 11). He said that Mark told him that the girl pointed the victim out to the suspect and said to the suspect "that's the guy," but that Martin "didn't see nothing" as to that occurrence (Movant's Exhibit 17 at 12). He said that Mark also told him that the suspect had scraggly brownish hair (Movant's Exhibit 17 at 13). He described how he later saw appellant stab the victim in the neck (Movant's Exhibit 17 at 8-9).

As can be seen from the above, the pretrial statements are consistent with Martin's testimony and show that Martin had a basis for identifying appellant, from his observations

during appellant's knife attack on the victim.

Additionally, appellant's counsel did cross-examine Martin about the recorded statement in question (Tr. 662), and then argued to the jury that Martin did see what happened because he had said in a recorded statement the day after the murder that he could not identify appellant except by what he had heard from Wolfe (Tr. 1076).

Appellant claims that he was prejudiced by the actions of his counsel because Wolfe's trial testimony made it look like he saw more that occurred at the Snak Atak than he actually observed because some of what he said occurred was based on what Wolfe told him (App.Br. 48). However, at trial appellant did not dispute what occurred at the Snack Atak (Tr. 571, 1072-1096).

Moreover, appellant could not have been prejudiced by the actions of his counsel because appellant's identification was not at issue in that appellant claimed that he acted in self-defense (Tr. 1082-1096). Martin did not need to be able to identify appellant to see that appellant reached through the truck window and stabbed the victim in the neck while the victim was in the truck.

E. Summary

From the above, it can be seen that the motion court did not clearly err when it found that appellant was not prejudiced by the actions of his counsel because appellant failed to present evidence showing the alleged impeachment would have actually been possible. Nor did he show that the alleged impeachment would have supported a claim of ineffective assistance of counsel because he failed to prove that it would have given rise to a reasonable

doubt as to the defendant's guilt. See State v. Hall, 982 S.W.2d 675, 687 (Mo.banc 1988), cert. denied 526 U.S. 1151 (1999). Thus, appellant's second point on appeal must fail.

III.

The motion court did not clearly err when it denied appellant's claim that he was denied effective assistance of counsel on the ground that his trial counsel chose not to request instructions for lesser-included offenses because appellant waived the right to a lesser-included offense instruction in that he wanted to pursue an all-or-nothing defense, and appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

Appellant alleges that he was denied effective assistance of counsel on the ground that his trial counsel decided, after consulting with appellant, not to submit jury instructions for the lesser-included offenses of murder in the second degree and voluntary manslaughter (App.Br. 55).

At the post-conviction evidentiary hearing, Leftwich testified that she made the decision not to request lesser-included offense instructions after "extensive conversations" with appellant (P.C.Tr. 46-47). She said that appellant "was adamant that he wanted an all-or-nothing type of defense" (P.C.Tr. 46).

The motion court found that counsel made this decision after hearing that appellant insisted on an all-or-nothing defense, and that counsel's decision was reasonable under the circumstances (P.C.Tr. 248).

Appellant implicitly concedes that it was possible for the all-or-nothing trial strategy to work in this case because there was evidence from which jurors could have acquitted him of murder in the first degree and convicted him of a lesser-offense (App.Br. 57-58). Thus, the

decision to pursue a strategy that was consistent with the wishes appellant was reasonable.

> A decision not to request a lesser-offense instruction is made frequently by defense counsel. It is a tactical decision usually based on the belief – often a reasonable one – that the jury may convict of the lesser offense, if submitted, rather than render a not guilty verdict on the higher offense if the lesser is not submitted. Likewise, the prosecutor will oftentimes request the lesser-offense instruction if he doubts the strength of his on the higher offense and desires a conviction of something rather than a possible total acquittal.

State v. Olson, 636 S.W.2d 318, 322 (Mo.banc 1982).

Although the choice of whether to submit a lesser-included offense is a decision that is for counsel to make, counsel cannot be convicted of error if she follows the defendant's wishes after the defendant has knowingly and intelligently made a waiver of the right, such as occurred in the case at bar.

For example, in State v. Ervin, 835 S.W.2d 905, 921-922 (Mo.banc 1992), cert. denied 507 U.S. 954 (1993), a case in which the defendant was convicted of murder in the first degree and sentenced to death, the defendant's counsel indicated that he did not want to submit lesser-included offense instructions for murder in the second degree and voluntary manslaughter because the defendant did not want those instructions. This Court found that Ervin's waiver was permissible. Id. at 922. It stated:

> Ervin's life was at stake; he chose to "take his chances with the jury." We will not interfere with such a gamble unless Ervin's waiver was not knowingly and

> intelligently made. Ervin makes no allegation, however, that his waiver was not knowingly and intelligently made. Indeed, the record indicates that Ervin knew of his options and specifically requested that no lesser-included offense instruction be submitted to the jury.

Id. This is equally true in the case at bar.

Appellant alleges that it was unreasonable not to submit a lesser-included offense because this left appellant without a defense (App.Br. 60). However, if it was true that appellant had no defense to the charge of murder in the first degree, appellant could not show that he suffered Strickland prejudice because the jury would have had to convict him of murder in the first degree regardless of what other instructions were submitted. If he had no defense to the charge of murder in the first degree, appellant would not have been entitled to any lesser-included offense instructions because there would have been no basis from the evidence to acquit him of murder in the first degree and convict him of the lesser-offenses. See State v. Santillan, 948 S.W.2d 574, 575 (Mo.banc 1997). Appellant implicitly concedes that it was possible for the all-or-nothing trial strategy to work in this case because there was evidence that provided him with a defense and from which jurors could have acquitted him of murder in the first degree and convicted him of a lesser offense (App.Br. 57-58).

Appellant also argues, as he did in his direct appeal, that Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 2382 (1980), requires that all lesser-included offenses must be submitted to the jury if they are supported by the evidence (App. Direct Appeal Br. at 38; App.Br. 60). However, Beck v. Alabama stands for the proposition that reversible error occurs

when a death penalty has been imposed by a jury that was given the options of convicting the defendant in a capital case, in which case it was required to impose the death penalty, or acquitting the defendant and allowing him to escape all penalties, but was not given the option of finding the defendant guilty of an offense that allowed the jury to recommend a penalty less than that of death that was supported by the evidence. The concern of Beck v. Alabama was that the fact-finding process could be distorted if the jury was faced with an all-or nothing choice between imposing the death penalty or innocence. Schad v. Arizona, 501 U.S. 624, 645-646, 111 S.Ct. 2491, 115 L.Ed.2d 836 (1991); Hopkins v. Reeves, 524 U.S. 88, 118 S.Ct. 1895, 1897, 141 L.Ed.2d 76 (1998). However, no such dilemma existed in the case at bar, because the jury could have convicted appellant of murder in the first degree and imposed a penalty other than death.

Appellant also failed to prove that Strickland prejudice occurred because he failed to show that there was a reasonable probability that he would have been convicted of murder in the second degree or voluntary manslaughter if those offenses had been submitted to the jury. The jury in this case found that appellant acted with deliberation, which means that appellant was guilty of murder in the first degree, rather than the lesser offenses. The imposition of the death penalty in this case is also indicative that the jury believed that this was truly a case of murder in the first degree.

In light of the above, appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the decision of his counsel not to submit lesser-included offenses. Thus, appellant's third point must fail.

IV.

The motion court did not clearly err when it rejected appellant's claim that he was denied effective assistance of counsel in the penalty phase on the ground that his trial counsel failed to cross-examine Tammy Lawson about prior statements that she made to the police and at a preliminary hearing because appellant's counsel acted pursuant to a reasonable trial strategy and appellant was not prejudiced by the actions of his counsel.

Appellant claims that he was denied effective assistance of counsel in the penalty phase on the ground that his trial counsel failed to cross-examine Tammy Lawson about prior statements that allegedly could have weakened the State's evidence that appellant deliberated when he stabbed the victim in the neck (App.Br. 63; P.C.L.F. 103). He claims that his trial counsel should have cross-examined Lawson about statements that showed that she and appellant were angry when appellant stabbed the victim to death, that the victim asked for appellant to get out of his car, that appellant fought with the victim in the street (after he stabbed the victim in the neck), and that Lawson told a friend that she planned on leaving town at some point in time because of another friend (App.Br. 63).

A. Relevant facts

1. Penalty-phase testimony

In the penalty phase of appellant's trial, Tammy Lawson, who was dating and living with the appellant at the time of the murder, testified that she was in the Snak Atak when the victim was there (Tr. 1151, 1153). She said that she mistakenly thought that the victim was making

a pass at her when he came in and pressed up against her (Tr. 1151). She got in a car with appellant and told him what had occurred (Tr. 1152-1153). Appellant asked her to point out the victim, and Lawson pointed him out to appellant as the victim left the convenience store (Tr. 1153, 1163). Appellant became irritated, and as the pickup truck that contained the victim drove off, appellant followed behind it in his car (Tr. 1153-1154). Lawson asked what appellant was going to do (Tr. 1155). Appellant said that he was "going to hurt that nigger" (Tr. 1155).

Appellant stopped his car next to the truck (Tr. 1155). He pulled out a knife that he normally concealed in a sheath at the small of his back, and he got out of his car (Tr. 115-1157). After he got back into the car and started driving off at a high rate of speed, he said, "One nigger down" (Tr. 1157). At the corner of Broadway and St. Louis, appellant took out the knife again and threw it out of the car (Tr. 1158).

After washing blood off of the driver's door of the car and packing clothes, appellant and Lawson fled to a trailer in Grove, Oklahoma (Tr. 1158-1159). While they were hiding there, appellant told Lawson that if they were caught she was supposed to say that the victim hit him first (Tr. 1160). Appellant told her that he was good at getting rid of witnesses (Tr. 1160).

2. Statements to the police

In a statement to the police, Lawson said that she told a friend who she saw at the Snak Atak that she was leaving town because of another friend "Ervin Keith, (ph.)" (H.Tr. 52). There is no evidence as to when she said she was going to leave town because of Keith.

In another statement to the police, which was made on October 6, 1998, Lawson said she had gotten mad at "the black guy in the store" when he bumped into her at the convenience store because she had not known that he was drunk (Movant's Exhibit 18 at 4). She said that she and appellant followed "the black guy," and that "they" hollered at her that she was a bitch and a whore and asked if she thought that she was better than them (Movant's Exhibit 18 at 4). Lawson said that when appellant and she caught up to the victim at the murder scene, and appellant said something to the victim about what happened at the store, the victim said "what's the matter you whore, you think you're better than me. You bitch, you think you're better than us" (Movant's Exhibit 18 at 14). She said that appellant got mad and the guy asked appellant to get out of his car (Movant's Exhibit 18 at 14). She said that appellant got out of his car (Movant's Exhibit 18 at 14). She said that appellant stabbed him (Movant's Exhibit 18 at 14). She said that the victim also got out of his vehicle and hit appellant with a bottle (Movant's Exhibit 18 at 14). As they drove to a trailer in Oklahoma, where they arrived at 2:00 a.m., appellant told Lawson that she was in as much trouble as he was (Movant's Exhibit 18 at 23). After appellant was arrested, he told Lawson to deny the knife and to say that the victim hit him first (Movant's Exhibit 18 at 28). At the conclusion of the statement, she pleaded for the police to protect her (Movant's Exhibit 18 at 29).

2. Preliminary hearing testimony

In appellant's preliminary hearing, Lawson testified that she was angry when she came out of the convenience store because she had not known that the victim was drunk when he brushed against her and she thought that he had done something that was perverted (Supp.L.F.

260, 275-277, 279). She said that she had "calmed down a little bit" when she reached appellant's car, but that she told appellant that she "didn't appreciate it" and that she may have used some cuss words when she said this to appellant (Supp.L.F. 278-280). She said appellant "wasn't happy" (Supp.L.F. 281). He pursued the victim with his car, got out of the car at an intersection with a knife in his right hand, and stabbed the victim in the neck before the victim threw a blow at him (Supp.L.F. 281).

3. Post-conviction hearing evidence

Although one of appellant's trial counsel, Valerie Leftwich, first said that she did not have any strategic reason for not cross-examining the victim with the above, she later admitted that she did not attempt to use some prior statements because she was aware that Lawson was a penalty-phase witness and that guilt was no longer an issue, and she was aware that if she tried to impeach Lawson with prior inconsistent statements she would have opened the door to the State bringing in prior consistent statements that Lawson had made on three or four occasions (H.Tr. 47-59, 86). She also said:

> my cross-examination of Tammy Lawson was very different as a penalty-phase witness than it would have been as a guilt-phase witness. And one of the reasons is because Tammy Lawson made a lot of statements and said a lot of hurtful things, as well as helpful things, and I was concerned about opening any doors in that area.

(H.Tr. 93).

4. Motion court's findings

The motion court found that counsel's cross-examination of Lawson was conducted pursuant to a reasonable trial strategy and that appellant was not prejudiced by the actions of his counsel (P.C.L.F. 250-251). It further stated:

> counsel did have available to her the fruits of the prior investigations. She knew not only of the inconsistencies highlighted by current counsel, but of the strengths and weaknesses of the entire case. She knew the status of the evidence during the trial, the tenor of the evidence, the context of the testimony at the time the witnesses were on the stand, and because of her trial preparation of the liabilities might arise from unfavorable evidence surfacing with any inconsistency..... Movant has not established that his trial counsel failed to exercise the customary skill and diligence that a reasonable and competent attorney would perform under the same or similar circumstances.

(P.C.L.F. 251).

B. Analysis

From the above, it can be seen that the motion court did not clearly err when it found that Leftwich was acting pursuant to a reasonable trial strategy when she did not question Lawson about the matters in question and that appellant was not prejudiced by the actions of his counsel. Evidence that Lawson and appellant were angry when appellant stabbed the victim to death, that the victim asked for appellant to get out of his car, that appellant fought with the victim in the street (after appellant stabbed the victim in the neck), and that Lawson told a

friend that she planned on leaving town at some point in time because of another friend were not important for counsel to bring out in the punishment phase because guilt had already been decided, the evidence in question did not tend to show that appellant was not guilty of murder in the first degree, and that evidence was largely cumulative to evidence that was adduced in appellant's trial (Tr. 587-594, 609-611, 634-635, 643-644, 681-682, 690, 721-722, 724,733, 742, 934-936, 941, 944-950, 1151-1158).

Leftwich was aware of the statements in question and reasonably chose as a matter of trial strategy not to present them to the jury. "[S]trategic choices made after thorough investigation of law and fact are virtually unchallengeable...." Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Wiggins v. Smith, ____ U.S. ___, 123 S.Ct. 2527, 2535, 156, L.Ed.2d 471 (2003).

Counsel was aware that Lawson had made many damaging statements against appellant that could be elicited by the State if she pressed Lawson further on the issues in question. She reasonably chose to avoid potential damage to appellant's case that could have resulted from her attempting to further litigate the issue of deliberation, which the jury had already decided. See Taylor v. State, No. SC85119 (Mo.banc Jan. 27, 2004)(counsel reasonably chose not to present penalty-phase evidence through a mental health expert regarding defendant's depression, post-traumatic disorder, and chemical dependance in order to show substantial impairment of his mental ability to appreciate the criminality of his conduct because of the harmful cross-examination that could have resulted in light of statements that the defendant had made to that expert); Rousan v. State, 48 S.W.3d 576, 583 (Mo.banc 2001), cert. denied

534 U.S. 1017 (2001)(counsel reasonably chose not to adduce evidence of records of the defendant's good conduct in prison in order to keep out evidence of the defendant's bad acts in prison).

Additional evidence that appellant killed the victim because he was angry with him would have constituted cumulative evidence that would have buttressed the State's theory of appellant's motive for being the initial aggressor in this case and for deliberating on the murder of the victim as he drove after the victim and then approaching him on foot before killing him.

Appellant's claim is also hindered by the fact that he failed to call Lawson to testify at the evidentiary hearing because he has not proven what would have occurred if he had cross-examined her on the matters in question. See State v. Johnson, 858 S.W.2d 254, 256 (Mo.App., E.D. 1993) (defendant failed to establish what evidence would have been adduced in the cross-examination of a witness because he failed to make an offer of proof); see also Rule 29.15(i)(movant has burden of proof). For example, if he asked her about her statement that she told a friend that she was leaving town because of Keith, she may have replied that this pertained to a planned trip in the distant future, not the middle-of-the-night trip that she and appellant took to Oklahoma to hide from the police immediately after the murder. She also may have said that she had initially lied about having prior plans to leave town because at that time she was trying to protect appellant on account of the fact that she was afraid that appellant would kill her if she cooperated with the police (See Movant's Exhibit 18 at 29-where victim asks the police for protection after talking to them about this case). Appellant has failed to prove that evidence could have been elicited from her that would have created a reasonable

probability that he would not have been given the death penalty. See Rousan v. State, supra at 582.

In light of the above, respondent submits that the motion court did not clearly err when it denied appellant's claim because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel. Thus, appellant's claim in his fourth point on appeal must fail.

V.

The motion court did not clearly err when it rejected appellant's claim that he was denied effective assistance of counsel in the guilt phase on the ground that his trial counsel failed to call a toxicologist, Dr. Terry Martinez, to testify that the victim's blood alcohol content would have affected the victim's behavior because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel.

Appellant alleges that the motion court clearly erred when it denied his claim 8(h) in his post-conviction motion that alleged that appellant's trial counsel "were ineffective for failing to call a toxicologist to testify in the guilt phase to Johnson's blood alcohol level and how his alcohol intoxication would affect his behavior. Dr. Terry Martinez, or other qualified toxicologist, would have testified that Johnson had to drink twelve beers in order to have a blood alcohol content of .29. Martinez also would have testified that intoxication reduces a person's inhibition and fear and increases aggression" (P.C.L.F. 101-102; App.Br. 68). Appellant neglects to mention, as will be discussed below, that the testimony of Martinez would have thrown doubt on whether the victim really had a .29 BAC.

A. Relevant facts

1. Trial testimony

In appellant's trial, Andrew Martin testified that he met the victim at a Garfield's restaurant at about 6:30 or 7:00 p.m., and that the victim arrived there first (Tr. 581). After they each had a beer at that restaurant, Martin took the victim to the victim's home so that the

victim could change his clothes, and Martin called Wolfe to see whether he wanted to meet them at Garfield's (Tr. 582). The victim and Martin returned to Garfield's at about 8:00 p.m., and Wolfe arrived there shortly thereafter (Tr. 584, 693). They ate supper and drank some beer (Tr. 584-585, 674-675). Martin said that the victim appeared to be "buzzed" from alcohol, but did not appear to be "falling all over himself" (Tr. 706, 714).

On cross-examination, appellant's counsel impeached Martin by presenting evidence that Martin did not know how many beers the victim had at Garfield's before Martin arrived there the first time, and by presenting evidence that the victim had a blood alcohol content of .29% after he was taken to the hospital (Tr. 630, 635, 917).

Mark Wolfe testified that he met the victim and Martin in Garfield's, they stayed for about 30 minutes and each drank a beer while he was there, and that they then left (Tr. 674-674). He said that the victim was not intoxicated (Tr. 675). Appellant presented testimony from Officer Darren Gallup that Wolfe told him that Johnson had four or five beers at Garfield's (Tr. 818).

In appellant's guilt-phase closing argument, his counsel argued that Andrew Martin was lying about what occurred because he "didn't want to admit that his friend, who was drunk, .29, almost three times the legal limit, he didn't want to admit that Mr. Johnson got out of that truck with a big 40-ounce beer bottle to hit Mr. Black" (Tr. 1076-1077). He later argued, "Why else would Andrew Martin not be honest with people on the stand? Because his friend Jason Johnson had a .29 blood alcohol level. Dr. Meier told you that from the stand. That the records from the hospital reflect that the alcohol level was .29 and that's after he' s already

been throwing up on the way there" (Tr. 1082).

2. Post-conviction proceedings

At the post-conviction hearing, evidence was adduced showing that Martinez could have testified that if the test results were correct the victim would have consumed about 12.3 beers to have a BAC of .29, and that the effect of such intoxication would include lessened inhibitions, causing inappropriate behavior and increased aggression (Martinez deposition at 18-21, 25-26, 29-30).

However, Martinez then backtracked and indicated that he could not say exactly how many beers the victim consumed and that the victim may really have had a much lower BAC than the test in question indicated (Martinez deposition at 28-36). Martinez said that he observed the videotape of the victim in the convenience store and observed that the victim did not appear to be severely intoxicated (Martinez deposition at 36). He said that the victim was not staggering and did not appear to be slurring words as one would expect if he in fact had a .29 BAC (Martinez deposition at 36). Martinez indicated that the victim could have had a .15 BAC that was consistent with the witnesses testimony if an alcoholic swab had been used when blood was drawn from him, or if the machine that performed the blood test did not work properly (Martinez deposition at 29-32). There was no evidence in this case as to whether a non-alcoholic swab was used or whether the machine that performed the testing worked properly.

Leftwich testified that she did not consider hiring a toxicologist in this case because all the evidence that she needed was the hospital reports that indicated that appellant had a .29

BAC (P.Tr. 44, 88). She said that she argued that the victim was very drunk and this was a reasonable inference from the evidence that showed that he had a .29 BAC (P.Tr. 89).

The motion court addressed this claim with a generalized finding that appellant failed to prove this claim with the requisite burden of proof, i.e., by a preponderance of the evidence (P.C.L.F. 252).

B. Analysis

The above shows that the motion court did not clearly err when it found that appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel because the appellant's counsel reasonably chose to proceed without calling an expert witness such as Martinez to testify. Leftwich was aware that she did not need an expert witness in order to be able to argue that the victim was extremely intoxicated and she did in fact argue that the victim was intoxicated with a BAC of .29, which was almost three times the legal limit (P.Tr. 44, 88; Tr. 1076-1077). An expert on intoxication is not required to explain what occurs when a person is intoxicated from alcohol because that is a matter of common knowledge. See State v. Vanosdol, 974 S.W.2d 650, 652-653 (Mo.App., W.D. 1998); State v. Spain, 759 S.W.2d 871, 875 (Mo.App., E.D. 1988).

Appellant also could not have been prejudiced by his counsel not presenting the testimony of Martinez because that testimony would have harmed his defense. Without the testimony of Martinez, appellant had evidence that the victim was severely intoxicated because he had a .29 BAC. With Martinez, appellant would have to deal with evidence that the victim may really have had a much lower BAC than the test in question indicated (Martinez deposition

at 28-36). Martinez said that he observed the videotape of the victim in the convenience store and observed that the victim did not appear to be severely intoxicated (Martinez deposition at 36). He suggested that the blood test result could have been wrong if the test was performed improperly (Martinez deposition at 36). There was no evidence in this case as to whether a non-alcoholic swab was used or whether the machine that performed the testing worked properly. Thus, the testimony of Martinez would have harmed appellant's defense by suggesting that the victim may not have been as intoxicated as the evidence at trial indicated. "If the testimony does not unqualifiedly support the defendant, failure to call that witness does not constitute ineffective assistance of counsel." State v. Jones, 921 S.W.2d 28, 34 (Mo.App., W.D. 1996). Accordingly, the appellant failed to prove that but for the actions of his counsel there was a reasonable probability that he would not have been given the death penalty. See Rousan v. State, 48 S.W.2d 576, 582 (Mo.banc 2001), cert. denied 534 U.S. 1017 (2001).

Moreover, the testimony in question would not have impeached Martin's and Wolfe's testimony about how many beers the victim consumed. Neither of them claimed to know how many beers the victim consumed before he met them at Garfield's. Additionally, their testimony that the victim was not intoxicated, but was "buzzed" from the alcohol, would have been corroborated by testimony from Martinez, discussed above, about the videotape of the victim in the convenience store showing that the victim did not appear to be severely intoxicated and that the victim's BAC could have been much less than .29 (Martinez deposition at 29-32, 36).

In light of the above, respondent submits that the motion court did not clearly err when

it denied appellant's claim that his trial counsel should have called Martinez as a witness because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel. Thus, appellant's fifth point must fail.

VI.

The motion court clearly did not clearly err when it denied appellant's claim that his trial counsel were ineffective in the penalty phase when they failed to object to State's Exhibit 24, appellant's corrections records, on the grounds that it did not comply with the requirements of the business records exception to the hearsay rule, it contained hearsay, and it contained comments on his post-Miranda silence because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by their actions.

Appellant alleges that the motion court clearly erred when it denied his claim that his trial counsel were ineffective in the penalty phase when they failed to object to appellant's corrections records on the grounds that they did not comply with the requirements of the business records exception to the hearsay rule, they contained hearsay, and they contained comments on his post-Miranda silence (App.Br. 74).

A. Relevant facts

The State presented evidence, i.e., records from the Department of Corrections, about appellant assaulting other inmates in 1982, 1986, 1992, 1993, and 1995, while he was incarcerated in the Missouri Training Center for Men in Moberly, the Algoa Correctional Center, the Central Missouri Correctional Center, and the Jefferson City Correctional Center (State's Exhibit 24).

A custodian of records for the Department of Corrections, Patricia Roll, filled out an affidavit on December 1, 1999, that stated that the records in question, in State's Exhibit 24,

were "kept in the regular course of business, and it was in the regular course of business for an employee or representative with knowledge of the act, event, condition, or opinion or diagnosis recorded to make the record, and the record was made at or near the time of the act, event, condition, opinion, or diagnosis" (State's Exhibit 24 at 1).

On December 6, 1999, the trial commenced (Tr. 192). On October 10, 1999, during the penalty phase, the State offered that exhibit into evidence (Tr. 1148). Appellant's counsel did not make any of the above objections to the exhibit, and it was admitted into evidence (Tr. 1148-1150). It contained the observations of correctional officers as to conduct violations that were committed by appellant (State's Exhibit 24).

In Rule 29.15 proceedings, appellant's counsel who handled most of the penalty phase, Kimberly Shaw, testified that she did not recall why she did not object to the exhibit not complying with the business record act based on the amount of notice that she was given (Shaw Deposition at 11). She said that she had probably gotten the document pretty close to December 1st (Shaw Deposition at 11). Shaw said that she did not recall whether the records in question had been given to her through discovery prior to the business records affidavit being filled out (Shaw Deposition at 19). She said that if they were in her file with the discovery, it would mean that they had been provided to her earlier with the extensive discovery that occurred (Shaw Deposition at 20). She said that she did not recall being surprised when she saw the records (Shaw Deposition at 20). She said that she did not recall whether she did not object to the records based on the prosecutor's willingness to bring a person from the Department of Corrections to the trial if she objected based on the business records act (Shaw

Deposition at 20-21).

Shaw said that she did not recall why she did not object on the grounds that the record contained layers of hearsay and contained a reference to post-Miranda silence (Shaw Deposition at 13-14).

The motion court addressed this claim with a generalized finding that appellant failed to prove this claim with the requisite burden of proof, i.e., by a preponderance of the evidence (P.C.L.F. 252).

B. Analysis

1. Alleged failure to object to timeliness of disclosure

Appellant alleges that his trial counsel was ineffective for failing to object to the records on the ground that they did not comply with the business records as evidence act because the records and the affidavit supporting those records were not provided to him at least seven days prior to the trial (App.Br. 79-80). See § 490.692.2, RSMo 2000.

However, appellant failed to prove that his counsel did not raise this objection as a matter of reasonable trial strategy. Shaw may have chosen to not contest the untimeliness of the disclosure that the State was going to offer the records with an affidavit from the records custodian instead of the custodian herself because appellant was not prejudiced by the untimeliness in that the material had already been provided to her through discovery and she knew that the State would call in the records custodian as a witness if she objected. Shaw may have made a deal with the prosecutor before the trial in order to avoid this. Shaw did not testify that this did not occur. She simply said that she could not recall whether this occurred (P.Tr.

20-21). Lack of recollection does not carry appellant's burden of proving his claim by a preponderance of the evidence. See Rule 29.15 (i).

> Where, as here, a movant's trial counsel does not remember the reasons for making a strategic decision, there is a failure to overcome the "strong presumption" that the decision was made as part of a reasonable trial strategy and the movant fails to meet the burden to demonstrate that the challenged actions were outside the scope of professionally competent assistance.

Clark v. State, 93 S.W.3d 455, 460 (Mo.App., S.D. 2003), Rickey v. State, 52 S.W.3d 591, 596 (Mo.App., W.D. 2001); Fretwell v. Norris, 133 F.3d 621, 627-28 (8th Cir. 1998), cert. denied 525 U.S. 846 (1998)(using counsel's inability to recall his reasons for his actions as evidence of ineffective assistance violates Strickland's presumption that an attorney performed reasonably). Additionally, appellant failed to prove that the prosecutor would not have been able to get the custodian of the records to personally testify if he had objected to the records on the ground in question.

2. Alleged failure to object to hearsay in the exhibit

Appellant alleges that his counsel should have objected to the exhibit on the ground that it contained numerous layers of hearsay (App.Br. 75). Appellant specifically raises allegations concerning the records about his assaults on inmates Hogue and Whitman (App.Br. 75-76). Respondent will specifically address those records individually below.

a. Assault on Hogue

The records pertaining to appellant's assault on Hogue contain the statement of

Corrections Officer Cook concerning his direct observations of the assault (State's Exhibit 24 at 4). He said that on the date that he wrote the report, April 12, 1982, he saw appellant strike Hogue over the head with a broom handle, causing the handle to break forming a point that cut Hogue's head (State's Exhibit 24 at 4). This was not objectionable because it was not inadmissible hearsay in that the report in question was prepared by someone who had a business duty to prepare it and it was prepared in the ordinary course of business close to the time of the reported event (State's Exhibit 24 at 1). State v. Sutherland, 939 S.W.2d 373, 376-377 (Mo.banc 1997).

It was also reasonable for counsel not to object to the report of the Assistant Superintendent of the prison and the supporting document and appellant was not prejudiced by the actions of his counsel because the report and the supporting document contained mitigating evidence in that they contained appellant's statement about his version of the fight, which was supported by the statements of witnesses who indicated that appellant was provoked by Hogue flipping water onto hot grease which caused the grease to pop up and burn appellant (State's Exhibit 24 at 3, 9).

b. Assault on Whitman

The documents pertaining to appellant's assault of Whitman are not objectionable because they are not inadmissible hearsay in that they were prepared by corrections officers who had a business duty to prepare them and they were prepared in the ordinary course of business close to the time of the reported event (State's Exhibit 24 at 1). State v. Sutherland, supra at 376-377. They show that correctional officers assigned appellant to temporary

administrative segregation confinement in June of 1993 while they were investigating the report that he assaulted another inmate (State's Exhibit 24 at 15). The report containing the statements of Corrections Officer Kliethermes concerned his direct observations, rather than hearsay, pertaining to a wound on Whitman's body (State's Exhibit 24 at 10). Statements that he heard that were recorded in that report and the report of Corrections Officer Charles Pritchard about appellant committing that offense were not offered for the truth of the matter asserted, but were used to instead to explain the initiation of the investigation (State's Exhibit 24 at 10). See State v. Murray, 744 S.W.2d 762, 773 (Mo.banc 1988), cert. denied 488 U.S. 871 (1988); State v. Brooks, 618 S.W.2d 22, 25 (Mo.banc 1981); State v. Baker, 23 S.W.3d 702, 715-716 (Mo.App., E.D. 2000).

Appellant says that the documents were hearsay because they contained "statements by inmates Lawrence Stojan, Richard Hampton, and Eugene Smith about the incident" (App.Br. 76). He neglects to mention that these statements were not incriminating, could have been viewed as mitigating, and contained appellant's defense for the conduct violation. Stojan said, "I don't know anything about it" (State's Exhibit 24 at 11). Hampton said, "I heard the chair screeching. I don't really think Black had a knife. I sure didn't see one. Lacy showed me a scratch on his chest and Lacy told me that Black had a shank. When I told Black that, Black stated 'he got cut on the chair" (State's Exhibit 24 at 11). Smith said, "There was nothing like that happen. I was there and they argued and that was it" (State's Exhibit 24 at 11). It was reasonable for counsel not to object to this evidence.

3. Alleged failure to object to references to appellant's post-Miranda silence

Appellant alleges that the records also referred to Miranda warning forms in which appellant indicated that he understood his rights but refused to waive his rights (App.Br. 82). The record shows that the corrections records contain references to three occasions in which appellant was informed of his rights, did not waive them, and no questions were asked (State's Exhibit 24 at 5, 10, 19, 21-22).

While it is true that it is improper to use a defendant's post-arrest post-Miranda silence "either as affirmative proof of a defendant's guilt or to impeach his testimony," State v. Howell, 838 S.W.2d 158, 161 (Mo.App., S.D. 1992); see also Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), a defendant's silence can be mentioned if it is not used for those improper purposes. State v. Anderson, 79 S.W.3d 420, 440-441 (Mo.banc 2002), cert. denied 537 U.S. 898 (2002)(no reasonable inference of guilt could be drawn from evidence that the defendant was informed of his rights and then exercised them where he was not being questioned when he invoked his rights); State v. Johnson, 943 S.W.2d 837, 840 (Mo.App., E.D. 1997). Here the records in question did not contain impermissible comments on appellant's right to remain silent because there was no evidence in those records that appellant stood mute in the face of an accusation or has failed to volunteer a statement when he was confronted with incriminating evidence. See Id. On the contrary, the records simply showed that appellant was informed of his rights, did not waive those rights, and that he was not asked any questions (State's Exhibit 24 at 5, 10, 19, 21-22). The prosecutor never argued that appellant was guilty of the assaults in question based on his invocations of his right not to

testify.

Additionally, appellant failed to prove that but for the actions of his counsel there was a reasonable probability that he would not have been given the death penalty. See Rousan v. State, 48 S.W.2d 576, 582 (Mo.banc 2001), cert. denied 534 U.S. 1017 (2001). The aggravating portion of the evidence in question was the evidence that appellant repeatedly assaulted other inmates, it was not that appellant had invoked his rights. The evidence of appellant's prior convictions for armed robbery and assault, and the evidence of his attack on a deputy that resulted in a serious injury to the eye of the deputy in September of 1999, while he was in the Jasper County Jail, also contributed to the death penalty, not the mere fact that appellant invoked his rights when he was informed of them on several occasions.

In light of the above, respondent submits that the motion court did not clearly err when it denied appellant's claim that he was denied effective assistance of counsel on the ground that his trial counsel did not object to State's Exhibit 24 because appellant failed to prove that his counsel acted unreasonably and that he was prejudiced by the actions of his counsel. Thus, appellant's sixth point must fail.

VII.

The motion court did not clearly err when it denied appellant's claim that this Court erred in appellant's direct appeal by failing to conduct de novo review in its proportionality analysis because this claim is not cognizable in post-conviction proceedings in that it could have been, and was, raised in appellant's direct appeal, and appellant's claim is without merit because this Court properly conducted its review.

Appellant alleges that the motion court clearly erred when it denied his claim that this Court erred in appellant's direct appeal by allegedly failing to apply de novo review in proportionality analysis (App.Br. 84).

A. Claim is not cognizable in post-conviction proceedings and may not be relitigated

This claim is not cognizable in proceedings pursuant to Rule 29.15 because it is a claim of error that could have been raised on direct appeal. See State v. Middleton, 103 S.W.3d 726, 740 (Mo.banc 2003), cert. denied 528 U.S. 1054 (1999); Luster v. State, 10 S.W.3d 205, 216 (Mo.App., W.D. 2000). Post-conviction motions cannot be used as a substitute for direct appeal. State v. Redman, 916 S.W.2d 787, 793 (Mo.banc 1996).

In fact, this issue was raised on direct appeal by this Court and was decided against appellant. State v. Black, 50 S.W.3d 778, 793-794 (Mo.banc 2001), cert. denied 534 U.S. 978 (2002). It was also specifically discussed by the parties in appellant's motion for rehearing and in respondent's response to that motion (See this Court's files in the underlying case). Since this issue was decided by this Court, appellant is collaterally estopped from relitigating it. Ayres v. State, 93 S.W.3d 827, 832 (Mo.App., E.D. 2002); Leisure v. State, 828 S.W.2d

872, 874 (Mo.banc 1992), cert. denied 506 U.S. 923 (1992).

B. Appellant's claim is without merit

Should this Court let appellant relitigate this claim, it is without merit because this Court properly conducted proportionality review under § 565.035, RSMo 2000, which requires this Court to determine:

> 1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; 2) whether the evidence supports a statutory aggravating circumstance and any other circumstances found; 3) whether the sentence of death is excessive or disproportionate to the penalty in similar cases, considering the crime, the strength of the evidence, and the defendant.

State v. Black, supra at 792.

In conducting this review, this Court considered the evidence in the light most favorable to the findings made by the fact-finder, and it conducted de novo review as to whether the sentence in this case violated § 565.035, RSMo 2000. This review did not give any discretion to findings of the trial court as to whether the sentence was proportionate because the trial court had not made findings on this issue. This Court then found that appellant's sentence did not violate that statute because it was not disproportionate. Id. at 792-793.

Appellant alleges that this Court erred because the Eighth Amendment to the United States Constitution allegedly requires de novo review as to the facts of cases (App.Br. 86-87). However, the Eighth Amendment is irrelevant to this discussion because it has nothing to do

with this Court's proportionality review. This is because "[p]roportionality review is not constitutionally mandated" Morrow v. State, 21 S.W.3d 819, 829 (Mo.banc 2000), cert. denied 531 U.S. 1171 (2001); Murry v. Delo, 34 F.3d 1367, 1377 (8thCir. 1994), cert. denied 515 U.S. 1136 (1995); Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

A review of the law in this area shows that this Court conducts proportionality review that utilizes de novo analysis where it is appropriate and that gives proper deference to facts supporting conclusions that are made by juries and trial courts. When the legislature enacted § 565.035, RSMo 2000, it did not intend for this Court to ignore the jury and impose the sentence it would have imposed if it had been the trier-of-fact. This Court's proportionality review was "designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and consistent imposition of death sentences." State v. Ramsey, 864 S.W.2d 320, 328 (Mo.banc 1993), cert. denied 511 U.S. 78 (1994). "The statutory review merely provides a backstop against the freakish and wanton application of the death penalty." Id. Under this scheme, the trial court is the final sentencer, State v. Feltrop, 803 S.W.2d 1, 15 (Mo.banc 1991), cert. denied 501 U.S. 1262 (1991), while this Court reviews the sentence, giving due deference to the conclusions that were made below, and determines whether the sentence is disproportionate as a matter of law. This last part of the analysis is de novo review.

Even if Eighth Amendment proportionality cases were relevant to this discussion, they would not assist appellant because those cases do not permit an appellate court to discard any sentence that it would not impose if it was the sentencer.

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

In conducting such review, the factual findings made by trial courts are accepted unless they are clearly erroneous, and the question of whether the sentence violates the constitution is a matter of law that is given de novo review. Cooper Industries, Inc. v. Leatherman Toolgroup, Inc., 532 U.S. 424, 435, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); United States v. Bajakajian, 524 U.S. 321, 336 at n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). This is the same rule as is consistently applied in appellate courts in other contexts. The facts are resolved by the lower court, while the appellate court determines the legal issues as a matter of law. See State v. Goff, No. 85564, slip op. at 5 (Mo.banc March 9, 2004)(in Fourth Amendment analysis, this Court conducts de novo review on legal issue but deference is given to factual findings).

In light of the above, respondent submits that this Court did not err when it gave proper deference to the facts in the light most favorable to the finding on appeal. Nor did it err when

it used those facts in its de novo review of the proportionality of appellant's sentence and found that appellant's sentence did not violate § 565.035, RSMo 2000, because it was not disproportionate. Thus, this Court should deny appellant's seventh point on appeal.

VIII.

The motion court did not clearly err when it denied appellant's motions to disqualify the post-conviction public defenders based on an alleged conflict of interest, to appoint him counsel from outside the Public Defender's Office, or in the alternative grant him leave to represent himself, because appellant did not have a right to conflict-free post-conviction counsel, his post-conviction counsel did not have a conflict of interest, appellant was not adversely affected by the alleged conflict, and appellant did not make an unequivocal, intelligent, voluntary and timely request to represent himself.

Appellant alleges that the motion court clearly erred when it denied his motions to reject the post-conviction counsel who were appointed and to give him new counsel from outside the Office of the Public Defender or to allow him to proceed pro se (App.Br. 88).

A. Relevant facts

The record shows that appellant was represented on direct appeal by Assistant Public Defender Rosemary Percival of the "Capital Litigation Division" of the Public Defender's Office in Kansas City, who filed appellant's brief on August 25, 2000 (Appellant's direct appeal brief). Appellant filed his pro se post-conviction motion on November 19, 2001 (P.C.L.F. 21). On December 14, 2001, the motion court appointed the "Western District Public Defender's Office, Appellate/PCR Division" to represent appellant (P.C.L.F. 84). On December 18, 2001, Rebecca Kurtz and Laura Martin, who were from that division, entered their appearances on appellant's behalf (P.C.L.F. 87, 203). On March 14, 2002, they filed, without objection from appellant, an amended Rule 29.15 motion for appellant (P.C.L.F. 94-

203).

On July 1, 2002, Kurtz and Martin asked for leave to withdraw on the ground that Public Defenders John Tucci and Antonio Manansala, who worked out of offices at 1221 Locust in St. Louis, were going to handle the case (P.C.L.F. 204-207, 209-210). The motion court granted the motion to withdraw and ordered Tucci and Manansala to serve as appellant's counsel (P.C.L.F. 208).

On August 12, 2002, appellant moved to reject his counsel from the Western District Appellate/PCR Division on the ground that he had allegedly been represented by someone from that division on direct appeal (P.C.L.F. 211-212). However, the attorneys from that division, Kurtz and Martin, had already withdrawn from the case (P.C.L.F. 208). Nevertheless, appellant asked for the motion court to "appoint legal counsel from outside the State Public Defender's Office, or in the alternative, to grant movant leave to proceed pro se with this cause of action" (P.C.L.F. 221). On September 4, 2002, the motion court denied this motion, which had been rendered moot by the withdrawal of Kurtz and Martin (P.C.L.F. 2, 213).

On September 23, 2002, appellant wrote the motion court and again complained that Kurtz and Martin had a conflict of interest (P.C.L.F. 214-215). On September 26, 2002, appellant filed "Motion to Disqualify Assigned Counsel and Grant Movant Leave to Proceed Pro Se" (P.C.L.F. 219). This motion attacked the appointment of Tucci and Manansala on the ground that they were employed by the same division that employed Percival (P.C.L.F. 220).

On March 4, 2003, appellant testified through a deposition about his desire to disqualify assigned counsel and appoint counsel from outside the Public Defender's Appellate PCR

Division or to grant him leave to proceed pro se (Black deposition at 5-12). Appellant alleged that all of the attorneys who had represented him had Lew Kollias as their boss and that this would destroy any Chinese walls that they created (Black deposition at 8).

At the Rule 29.15 evidentiary hearing on June 24, 2003, appellant's post-conviction counsel, Tucci and Manansala, did not present any evidence for appellant on the issue of the alleged conflict of interest of Kurtz and Martin or themselves, and the motion court denied appellant's motion to disqualify counsel or to allow him to proceed pro se (P.Tr. 1-2).

B. Analysis

Appellant claims that his counsel had a conflict of interest that required the motion court to appoint new counsel or to allow him to proceed pro se. Respondent will address the alleged conflict of interest and then the allegation that appellant should have been allowed to represent himself.

1. Alleged conflict of interest

a. Claim is not cognizable on appeal

A claim of a conflict of interest is a claim of ineffective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 344-345, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). However, "[t]here is no constitutional right to counsel in a post-conviction proceeding." Barnett v. State, 103 S.W.3d 765 (Mo.banc 2003), cert. denied 124 S.Ct. 172 (2003). "Thus, a post-conviction movant has no right to effective assistance of counsel," id., and a movant may not claim on appeal that his post-conviction counsel were ineffective because they had a conflict of interest. The only exception to this is where the record shows an abandonment by counsel that is a total

default in carrying out the obligations of appointed counsel under the rules. Shirley v. State, 117 S.W.3d 187, 189 (Mo.App., S.D. 2003). "This Court has repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel." Barnett v. State, supra at 774. Accordingly, appellant's claim that he was denied effective assistance of post-conviction counsel on the ground that said counsel had a conflict of interest is unreviewable on appeal and must fail.

Respondent notes that appellant relies on cases such as State v. Taylor, 1 S.W.3d 610 (Mo.App., W.D. 1999), and State v. Griddine, 75 S.W.3d 741 (Mo.App., W.D. 2002) (App.Br. 90). However, those case deal with situations where *direct appeal counsel* had a conflict of interest that interfered with the defendant's right to seek post-conviction relief. State v. Taylor, supra at 611-612; State v. Griddine, supra at 744-745. Moreover, those cases are distinguishable from the case at bar because they are based on the right to effective assistance of direct appeal counsel and there is a right to effective assistance of direct appeal counsel. Moss v. State, 10 S.W.3d 508, 514-15 (Mo.banc 2000). However, the case at bar does not involve that right. It involves a claim of ineffective assistance of post-conviction counsel and, as was stated above, appellant does not have a right to effective assistance of post-conviction counsel. Accordingly, appellant's claim that he was denied effective assistance of post-conviction counsel on the ground that said counsel had a conflict of interest is unreviewable on appeal and must fail.

b. Claim of conflict of interest is without merit

In any event, on appeal, appellant does not appear to claim that his counsel had a conflict

of interest, but instead alleges that "[a] remand is necessary to determine *whether* a conflict existed, and if so, conflict-free counsel must be appointed." (App.Br. 93 – emphasis added). However, appellant has already had the opportunity to prove his claim and has failed.

The record refutes appellant's allegation in that it shows that appellant's counsel did not have a conflict of interest. It is appellant's burden to show his counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsels' performance. State v. Taylor, supra at 611. "To prove an actual conflict of interest, [appellant] must show that his trial attorney either acted or failed to act in a way that was detrimental to [appellant's] interests and was advantageous to a person whose interests conflicted with [appellant's]." State v. Taylor, supra, at 611-612.

In the case at bar, appellant did not show that his post-conviction counsel, Martin and Kurtz, actively represented conflicting interests. They represented appellant and they had no interest in not attacking the conduct of other public defenders because the main reason for the existence of their jobs was for attacking the conduct of other public defenders during trials. See State ex. rel. Public Defender's Comm'n v. Bonacker, 706 S.W.2d 449, 450 (Mo. banc 1986). Thus, there is no inherent conflict of interest from having successive representation from assistant public defenders in both a direct appeal and a post-conviction action. Id.

Furthermore, the Public Defender's Office took steps to organized itself in such a way as to prevent the dangers of any conflict or even an appearance of impropriety, by assigning direct appeal counsel and post-conviction counsel from different divisions of the Public Defender's Office. See State v. Moore, 934 S.W.2d 289, 292 (Mo.banc 1996). Appellant's

direct appeal counsel, Rosemary Percival, was from the "Capital Litigation Division" of the Public Defender's Office, while his initial post-conviction counsel, Rebecca Kurtz and Laura Martin, were from the Appellate/PCR Division (Appellant's direct appeal brief cover; P.C.L.F. 84). Additionally, appellant's subsequent post-conviction counsel, Tucci and Manansala, worked out of offices in St. Louis and were thus physically separated from the other public defenders in question (L.F. 209).

Moreover, appellant failed to prove that the alleged conflict of interest adversely affected the conduct of his counsel, see State v. Taylor, supra at 611, because he has not proven that his post-conviction counsel in question failed to raise any meritorious issues of ineffective assistance of direct appeal counsel. The failure to raise non-meritorious claims as to the conduct of direct appeal counsel would not be an adverse effect. In fact, the decision to not to raise nonmeritorious claims is a reasonable strategic decision. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 752-753, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). In fact, even though this Court could easily decide if appellant's direct appeal counsel had abandoned a meritorious claim because the record before this Court is the same as the record that would have been available to direct appeal counsel, appellant has abandoned all such claims of an adverse effect by not arguing their merits in appellant's post-conviction brief on appeal. See State v. Charlton, 114 S.W.3d 378, 386 (Mo.App., S.D. 2003).[3]

[3]This would not be true in a case where direct appeal counsel had a conflict of interest

2. Pro se representation claim

The motion court did not clearly err when it denied appellant's motions for appellant to represent himself because appellant did not make an unequivocal, intelligent, voluntary, and timely request to represent himself.

Analysis of this issue is similar to analysis of the right to self-representation in criminal cases. In that context this Court has held that a criminal defendant's motion to represent himself involves two mutually exclusive rights: the right to be represented by an attorney, and the right not to be represented by an attorney. State v. Hampton, 959 S.W.2d 444, 447 (Mo.banc 1998). A court must indulge in every reasonable presumption *against* the waiver of the right to counsel, and require the defendant to make a timely, knowing, intelligent, voluntary, and unequivocal request before concluding that he was waived his right to counsel and invoked his right to represent himself. Id.

In the case at bar, the trial court properly denied appellant's motion to disqualify counsel based on an alleged conflict of interest or in the alternative to allow him to proceed pro se because these motions were not made intelligently and voluntary in that appellant was under the mistaken belief that his counsel had a conflict of interest. See State v. Funke, 903

---

that prevented a post-conviction motion from being filed because it is too difficult for an appellate court to determine an adverse effect under those circumstances in that an evidentiary hearing may be required and an appellate courts are not permitted to make the determination of whether a hearing is required unless that determination has already been made by a post-conviction motion court. Huggins v. State, 815 S.W.2d 88, 89 (Mo.App., E.D. 1991).

S.W.2d 240, 243-244 (Mo.App., E.D. 1995)(trial court properly rejected a defendant's request to represent himself because of the defendant's misunderstandings concerning the case). As was discussed above, no conflict of interest existed.

Moreover, appellant's request to represent himself if the Court would not appoint counsel from outside the Public Defender's Office to his case was not a voluntary unequivocal request for self-representation because it indicated that appellant really wanted counsel, but would represent himself if he did not get the counsel of his wishes. This is a statement that indicates that appellant's request for self-representation has been made under duress and that he really wants different counsel. "Such a request is not considered unequivocal where the defendant merely states that he would prefer to represent himself rather than accept the aid of his appointed attorney, but would like another attorney appointed who meets his standards." State v. Hamilton, 791 S.W.2d 789, 796 (Mo.App., E.D. 1990); State v. Williams, 716 S.W.2d 452, 453 (Mo.App., S.D. 1986).

Further, appellant's request for self-representation if he could not have counsel from outside the State Public Defender's Office was untimely. See State v. Garrison, 928 S.W.2d 359, 362 (Mo.App., S.D. 1996). Although appellant filed his pro se post-conviction motion on November 19, 2001, and the motion court appointed the "Western District Public Defender's Office, Appellate/PCR Division" to represent appellant on December 14, 2001, appellant did not file his motion to appoint counsel from the Public Defender's Office or, in the alternative, to allow him to proceed pro se until August 12, 2002 (P.C.L.F. 21, 84, 211-221). This was long after Kurtz and Martin had filed appellant's amended post-conviction

motion, which occurred on March 14, 2002 (P.C.L.F. 94-203).

This untimeliness means that even if appellant was dissatisfied with the amended motion he could not replace it with an untimely second amended motion because the motion court was without jurisdiction to accept an untimely motion. Edgington v. State, 869 S.W.2d 266, 268 (Mo.App., W.D. 1994). Additionally, appellant could not fall back and litigate the claims in his pro se post-conviction motion because that motion had been replaced by the amended motion. Self v. State, 14 S.W.3d 223, 224 (Mo.App., S.D. 2000); but see Bittick v. State, 105 S.W.3d 498 (Mo.App., W.D. 2003)(court found that remedy for violation of right to self-representation was to allow the defendant to litigate claim raised in his pro se motion). Any attempt to replace the amended motion with another motion, including the pro se motion that had been replaced by the amended motion, would be an untimely motion that the motion court could not accept. See Edgington v. State, supra at 268.

In light of the above, the trial court did not err when it denied appellant's request to have counsel outside of the Public Defender's Office appointed or in the alternative to allow him to represent himself. Thus, appellant's eighth point must fail.

IX.

The motion court did not clearly err or commit plain error when it denied appellant's pro se motion to disqualify the Honorable Jon Dermott from hearing appellant's Rule 29.15 proceedings because: (A) appellant lacked authority to get a change of judge with a pro se motion in that he was represented by counsel and whether to move to recuse the judge is a tactical decision that is reserved for counsel; and (B) a reasonable person who was aware of what had gone on in the court would not have believed that Judge Dermott was biased against appellant based on Judge Dermott's statement that appellant's counsel had done a fine job, and appellant's claim that Judge Dermott refused to consider appellant's evidence is based on a misrepresentation of the record.

Appellant alleges that the motion court erred when it denied appellant's pro se motion for a change of judge for cause because the judge had said during appellant's trial that appellant's trial attorneys did a fine job (App.Br. 95). He also alleges that the motion court judge was biased because he allegedly refused to consider the testimony of seven witnesses during post-conviction proceedings (App.Br. 95).

A. Relevant facts

The trial judge was the Honorable Jon Dermott (Tr. 1-2). During the trial, appellant made a record concerning what he alleged was deliberate ineffectiveness of his trial counsel (Tr. 852-858). Later during the trial, the Judge Dermott asked if the defendant had settled down since he made his record (Tr. 903). After the jury found that appellant was guilty, Judge

Dermott said, "Incidentally, you all did a fine job I thought, his complaints not withstanding" (Tr. 1116). After sentencing appellant to death, the trial court found, as is required by Rule 29.07(b)(4), that there was "no probable cause of ineffective assistance of counsel at trial" (Tr. 1252).

Appellant filed a Rule 29.15 motion (P.C. 21). On April 28, 2003, which was after appellant's post-conviction counsel were appointed to represent him, he filed a pro se motion for a change of judge (P.C.L.F. 1, 225). That motion alleged that Judge Dermott was biased because he had said that appellant's trial attorneys had done an excellent job (P.C.L.F. 225). On May 1, 2003, the motion court denied appellant's motion for a change of judge (P.C.L.F. 228).

At appellant's Rule 29.15 evidentiary hearing, appellant's counsel offered the depositions of seven witnesses "to save judicial economy from them coming into court" (P.C.Tr. 3). Judge Dermott said that he did not intend to read every line of the seven depositions unless they were relevant (P.C.Tr. 3). Appellant's counsel assured the Court that he could direct the court to the claims that the witnesses pertained to and that the depositions were all relevant (P.C.Tr. 3-4). Counsel then discussed the depositions and other evidence that was going to be admitted with Judge Dermott (P.C.Tr. 4-10).

B. Analysis

1. Appellant lacked authority to request a change of judge

Appellant's claim that the trial court should have granted his pro se motion for a change of judge is without merit because appellant lacked authority to request a change of judge in that

he was represented by counsel and the decision to request a change of judge is a tactical decision for counsel to make. State v. Carver, 771 P.2d 1382, 1390 (Ariz. 1989). "A defendant has no right to proceed pro se and through counsel." State v. Hurt, 931 S.W.2d 213, 214 (Mo.App., W.D. 1996). "While certain fundamental decisions in a case – whether or not to plead guilty, waive a jury, testify, or appeal – rest with the accused, other decisions that an attorney must make during the course of a trial are for the attorney alone, even without the advice or consultation of the client." Id. (trial court is not required to consider pro se claims when a defendant is represented by counsel); see also New York v. Hill, 528 U.S. 110, 114-115, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000); Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Thus, appellant's claim should be denied.

2. The judge was not biased

Should this Court look past the fact that appellant was not authorized to request a change of judge, the record shows that Judge Dermott properly denied appellant's request for a change of judge because he was not biased against appellant.

a. General law on judicial disqualification

Missouri's standard for judicial disqualification is drawn from Missouri's Code of Judicial Conduct, Rule 2, Canons 2 and 3(C), "which provide that a judge should avoid the appearance of impropriety and shall perform judicial duties without bias or prejudice, and Rule 2, Canon 3(D), which provides that a judge should recuse in a proceeding in which the judge's partiality might reasonably be questioned." State v. Kinder, 942 S.W.2d 313, 321 (Mo.banc 1996), cert. denied 522 U.S. 854 (1997). The test applied is whether a reasonable person

would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court. State v. Jones, 979 S.W.2d 171,178 (Mo.banc 1998), cert. denied 525 U.S. 1112 (1999). "'A reasonable person... is not one who is ignorant of what has gone on in the courtroom before the judge. Rather, the reasonable person knows all that has been said and done in the presence of the judge.'" Smulls v. State, 10 S.W.3d 497, 499 (Mo.banc 2000), cert. denied 531 U.S. 881 (2000)(citation omitted). Moreover, "[i]t is presumed that judges act with honesty and integrity." State v. Kinder, supra at 321. Under this standard, "[a] disqualifying bias and prejudice is one with an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learning from participation in the case." State v. Nicklasson, 967 S.W.2d 596, 605 (Mo.banc 1998), cert. denied 525 U.S. 1021 (1998); State v. Hunter, 840 S.W.2d 850, 866 (Mo.banc 1992), cert. denied 509 U.S. 926 (1993).

A disqualifying "bias or prejudice must be personal, rather than judicial, and must be to such an extent so as to evince a fixed prejudgment and to preclude a fair weighing of the evidence." Williams v. Reed, 6 S.W.3d 916, 921 (Mo.App., W.D. 1999); State ex rel. Wesolich v. Goeke, 794 S.W.2d 692,697-698 (Mo.App., E.D. 1999).

A disqualifying bias can arise from a judicial source only if there is evidence of actual bias which is so extreme as to display a clear inability to render fair judgment. Haynes v. State, 937 S.W.2d 199, 203 (Mo.banc 1996)(trial judge was permitted to rule on Rule 29.15 motion even though at sentencing he had referred to the defendant as a monster and stated that he hoped that he died in prison in part because there was no evidence of an "impossibility of a fair

judgment").

The fact that a judge has ruled against a defendant in a related case is not a disqualifying basis. State v. Simmons, 955 S.W.2d 729, 744 (Mo.banc 1997), cert. denied 522 U.S. 1129 (1998)(trial judge allowed to preside over Rule 29.15 motion even though he made statements about the brutal and repulsive nature of the murder when he sentenced the defendant to death); State v. Christeson, 780 S.W.2d 119, 121-122 (Mo.App., E.D. 1989)(judge was not disqualified from case involving sex crimes even though he had heard evidence concerning the material facts of the case in a juvenile court action); Lamb v. State, 817 S.W.2d 642, 643 (Mo.App., S.D. 1991)(judge was not disqualified from hearing in a case in which the defendant kidnapped the defendant's ex-wife even though the judge had presided over the divorce case that was part of the motive for the kidnapping).

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task . . . Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky v. U.S., 510 U.S. 540, 550-551, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Judges are presumed to be able to disregard matters that are not properly before them. State v. Roll, 942 S.W.2d 370, 378 (Mo.banc 1997), cert. denied 522 U.S. 954 (1997).

b. Alleged bias based on statement that counsel did a "fine job"

As to appellant's claim that Judge Dermott was biased against him because he stated that appellant's counsel did a fine job, this claim is without merit because there was no extrajudicial source of the alleged bias and because the statement in question, which was made in the regular course of dealing with appellant's complaints against his counsel during a trial, did not show that the trial court would be unwilling to reconsider the issue of trial counsels' effectiveness during post-conviction proceedings. A reasonable person who heard this comment and was aware of the presumption that judges act with honesty and integrity would not doubt that the trial judge could be impartial.

Moreover, the whole point of the rule that the trial judge is the proper judge to hear the post-conviction proceeding is that the trial judge is best able to determine the competency of counsel based on his or her observations during the trial. Thomas v. State, 808 S.W.2d 364, 366 (Mo.banc 1991). This case is similar to State v. Tivis, 948 S.W.2d 690, 699 (Mo.App., W.D. 1997), where the trial judge stated during sentencing that trial counsel "did a remarkable job" and gave a "rather eloquent closing argument." The Court of Appeals found that the trial judge was not required to recuse himself from the Rule 29.15 proceedings because there was no evidence of bias from an extrajudicial source and the comments in question were made as part of the judge's duties pursuant to Rule 29.07(b)(4) to determine the effectiveness of

counsel. Id. at 699-700. It found that a judge's regular rulings in the ordinary course of presiding over judicial proceedings properly before the judge will rarely, if ever, constitute evidence of partiality such as to require the judge in good conscience to recuse himself, and that under the facts of this case a reasonable person would not have a factual basis for doubting the partiality of the judge. Id. Thus, appellant's first claim of bias is without merit.

c. Claim that Judge Dermott did not want to consider testimony

Appellant's claim that Judge Dermott was biased against appellant because "he stated he did not want to consider the testimony of seven witness who supported Mr. Black's claim of ineffective assistance," is not preserved for appeal because it was not raised below as grounds for disqualifying Judge Dermott (App.Br. 95).

Additionally, this claim is without merit because it is based on a misrepresentation of the record (App.Br. 95). Judge Dermott did not say that he did not want to consider any evidence that was relevant. On the contrary, when he admitted the seven depositions at once, he said that he only wanted to read in them what was relevant, and appellant's counsel told him he could direct him to the relevant portions of the depositions (P.C.Tr. 3-10). Counsel may properly be required to direct the trial court's attention to the portion of the record relied on in support of the claims made. Parkus v. State, 781 S.W.2d 545, 547 (Mo.banc 1989), cert. denied 488 U.S. 900 (1988). Thus, Judge Dermott did not err or plainly err when he denied appellant's motion for a change of judge and appellant's ninth point must fail.

CONCLUSION

In view of the foregoing, the respondent respectfully requests this Court to affirm the denial of appellant's Rule 29.15 motion.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

_____

BRECK K. BURGESS
Assistant Attorney General
Missouri Bar No. 34567

Post Office Box 899
Jefferson City, Mo 65102-0899
(573) 751-3321
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 20,317 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 12th day of April, 2004, to:

Melinda Pendergraph
Assistant Public Defender
3402 Buttonwood
Columbia, Missouri 65201-3724
Attorney for Appellant

JEREMIAH W. (JAY) NIXON
Attorney General

_____

BRECK K. BURGESS
Assistant Attorney General
Missouri Bar No. 34567

Post Office Box 899
Jefferson City, Mo 65102-0899
(573) 751-3321
Attorneys for Respondent

APPENDIX